*United States Court of Appeals*

*for the Second Circuit*

# APPELLANT'S BRIEF

# 76-7414

IN THE

# United States Court of Appeals

FOR THE SECOND CIRCUIT

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BRUNSWICK CORPORATION and SHERWOOD MEDICAL INDUSTRIES, INC., *Counterdefendants-Appellees,*

v.

DAVID S. SHERIDAN and NATIONAL CATHETER CORPORATION, *Counterclaimants-Appellants.*

8 P/s

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**On Appeal From The United States District Court For The Northern District of New York**

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## BRIEF FOR APPELLANTS

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## BRIEF FOR APPELLANTS

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### DECISION BELOW

The decision of the Honorable James T. Foley, District Judge, directing a verdict against Counterclaimants on Count I of their counterclaim was delivered orally from the bench and is not reported. The decision appears at pages 2151-59 of the trial transcript (*see also* I Joint Appendix,[1] 315-322).

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[1] Volume I of the Joint Appendix will hereinafter be cited as "I J.A."; Volume II will be cited as "II J.A."

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether appellees' expansive interpretation and application of the non-compete provision in the 1971 agreement was an attempt to extend a patent monopoly in violation of section 1 of the Sherman Act?

2. Whether the "ancillary restraints" doctrine applied in light of the dominant purpose of the attempted restraint, the appellees' monopoly power with respect to the product involved and the harm inflicted upon the public by the restraint?

3. Whether the restraint which appellees sought to impose was reasonably ancillary to any legitimate transaction?

4. Whether there was sufficient evidence to permit findings that appellees' dominant purpose was anticompetitive, that the harm inflicted upon the public by the restraint was unreasonable and that the attempted restraint was not reasonably ancillary to any legitimate transaction?

5. Whether there was sufficient evidence to permit a finding that appellees' conduct constituted a violation of section 2 of the Sherman Act?

## STATEMENT OF THE CASE

This appeal is from the order of the District Court directing a verdict against counterclaimants on count I of their counterclaim which alleged violations of sections 1 and 2 of the Sherman Act.[2] Following the directed verdict on the counterclaim, the remaining issues in the case were submitted to the jury, and, upon the inability of the jury to reach a verdict, a mistrial was declared. The trial court then directed entry of a final judgment on the counterclaim pur-

[2] The District Court also directed verdicts on counts III and IV of counterclaim which asserted related common law claims. The counterclaimants originally noted but are not pursuing an appeal with respect to those counts.

suant to Federal Rule 54(b) so that the issues presented could be resolved by this Court prior to retrial of the case.

### The Parties

Counterclaimants in the court below and appellants here are David Sheridan ("Sheridan") and National Catheter Corporation ("National Catheter"). Sheridan is an inventor and businessman and is recognized as "one of the industry's leading inventors and innovators in connection with the manufacture of plastic tubing for surgical purposes" (I J.A., 26). Sheridan was the founder and a principal shareholder of counterclaimant National Catheter, which operates a plant in Argyle, New York (I J.A., 248-249). National Catheter manufactures and sells plastic tubing, including conductive line tubing used for surgical operations (I J.A., 238).

Counterdefendants and appellees are Brunswick Corporation ("Brunswick") and its subsidiary Sherwood Medical Industries, Inc. ("Sherwood") (I J.A., 31). Brunswick is a large, diversified national corporation headquartered in Chicago. Sherwood, since its formation by Brunswick in 1967, has been engaged in the manufacture and sale of a variety of medical supplies, including medical tubing (I J.A., 26; 124).

### Sheridan's 1960 Agreement with Brunswick

Sheridan's relationship with Brunswick began in February 1960 (I J.A., 42). For some years prior to that time Sheridan had operated a small company, known as Sheridan Catheter and Instrument Corporation,[3] which produced a variety of plastic tubing and catheters, primarily for specialized medical uses (I J.A., 26). Sheridan's activities during that period included the invention and development of various types of tubing including types known as

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[3] National Catheter was not formed until 1967, after Sheridan's relationship with appellees had terminated. (I J.A., 248.)

"bubble" tubing, x-ray tubing and conductive line tubing (I J.A., 35-42; 239-241).

Brunswick's negotiations with Sheridan began in 1959 and culminated in February 1960 with the execution of a package of agreements whereby Brunswick, among other things, obtained licenses to use Sheridan's patents, hired Sheridan as an employee and acquired Sheridan's company (II J.A., 323-347; 348-366; 367-370; 372-380).

The patent license obtained by Brunswick as part of the package of agreements was, by its express terms, an exclusive license (II J.A., 350, § 1.1). Thus, Sheridan was prohibited from licensing any other company to manufacture products using his patents. The license was to extend until the expiration of the last patent (II J.A., 351, § 2.1). Although Brunswick had the right to terminate the license after five years, and at certain designated times thereafter, the license was binding on Sheridan for the full period without any right of termination (II J.A., 353, § 2.5). The license, as later amended, covered 19 United States and foreign patents and patent applications, including Sheridan's patents on bubble tubing, x-ray tubing and conductive line tubing (II J.A., 367-370).

The 1960 agreements also contained a provision prohibiting Sheridan from competing with Brunswick or its subsidiaries in any line of business for a period of 19 years with no geographic limitations (II J.A., 374-376, ¶¶ 7, 10). Although the provision was included in an employment agreement, it was not limited to fields in which Sheridan had been involved during his employment and was to remain in effect for the full 19-year period regardless of how long Sheridan was employed unless the employment was terminated by Brunswick (II J.A., 374-376, ¶¶ 7-11).

The 1960 agreements also provided that Sheridan would be the "head" of the Sheridan Catheter division of Brunswick (which eventually became part of Sherwood) (II J.A.,

372, ¶ 1). After agreeing that Sheridan would be the "head" of Sheridan Catheter, Brunswick embarked on a course of conduct designed to relegate Sheridan to an inferior position in the company and to deprive him of the rights and prerogatives which he was entitled to have as the head of the division (I J.A., 241-244).

This course of conduct culminated in a letter to Sheridan from John N. Willman, the head of Brunswick's Health and Science Division, in which Sheridan was advised that he had no duties other than "to spearhead product development" (II J.A., 531). In the same letter, Sheridan was told, in effect, that only three of the division's three hundred employees reported to him and that if he made any effort to reaffirm his authority as head of Sheridan Catheter his efforts would be "repudiate[d]" (*Id.;* I J.A., 276-277). Sheridan's employment with Brunswick terminated approximately two weeks later in October 1967 (I J.A., 243-244).

Thereafter, in January 1968, Brunswick and Sherwood filed suit in District Court[4] seeking to enforce the noncompete provisions in the 1960 agreements in order to prevent Sheridan from competing with Brunswick or Sherwood until February 19, 1979, at which time Sheridan would have been over seventy years old (II J.A., 506-517; I J.A., 238). Sheridan counterclaimed for damages for breach of contract and received a $100,000 payment from Brunswick and Sherwood when the suit was eventually settled, after more than three years of litigation, in May 1971 (II J.A., 494-505; 391, ¶ 11).

### The 1971 Agreement

The terms of the settlement were set forth in a written agreement dated May 28, 1971 (II J.A., 387-391). In the agreement, the appellees essentially acknowledged Sheri-

[4] The suit was styled *Brunswick Corporation, et al.* v. *David S. Sheridan, et al.* and was docketed as 68-CV-25 (N.D.N.Y.). (II J.A., 506-517.)

dan's right to compete in the development, manufacture and sale of medico-surgical tubing and catheters with three carefully-delineated exceptions. These exceptions were set forth in paragraph 5 of the agreement which provides, in pertinent part, as follows:

> For a period of five years from the date hereof, neither Sheridan nor National Catheter shall . . .
>
> * * *
>
> (b) manufacture, have manufactured, use, sell or otherwise deal in flexible tubing made by any process in which the wall thickness of the tubing or the inner and/or outer diameters of the tubing is/are controlled so as to incorporate the features or configuration of an integral bubble or funnel similar to those manufactured by Sherwood as of February 1969, or *incorporating features or configuration of an x-ray or conductive line similar to the products manufactured by Sherwood as of February 1969*. (II J.A., 389, ¶ 5 [emphasis added].)

It is this provision and, in particular, the language relating to conductive line tubing on which the appelles sought to rely in the suit below (I J.A., 2, ¶¶ 10-12).

Conductive line tubing is medical tubing made of clear plastic which contains a thin line of electrically conductive material running the entire length of the tubing (II J.A., 371; I J.A., 27; 43-44). The purpose of the tubing is to prevent the build-up of static electricity, especially in hospital operating rooms, where sudden static discharges can cause the explosion of flammable gases or cardiac arrest as a result of what is known as "microshock" (I J.A., 33; II J.A., 408; 410; 412-413).

Sheridan had formed National Catheter shortly after leaving Brunswick in 1967, and, in approximately January of 1972, National Catheter began to manufacture what is known as "piggyback" conductive line tubing. The tubing was made by National Catheter Corporation, under a patent which had been issued to Isaac Jackson, National Cath-

eter's Director of Product Development, in May 1971, shortly before the 1971 agreement was signed (I J.A., 159-160; 244-245).

Until 1972, Sherwood (and before Sherwood's formation, Brunswick) had been the only manufacturer of conductive line tubing (I J.A., 75). The Sherwood tubing was manufactured under a patent licensed to Brunswick by Sheridan which had been issued in 1962 (II J.A., 348-366; 367-370).

The National Catheter product differed from the Sherwood product in a number of respects.[5] For example, the National Catheter conductive line was welded to the outside of the tubing in a "piggyback" configuration whereas the Sherwood conductive line was incorporated in the wall of the tubing which therefore had a smooth circumference (I J.A., 153). In addition, the National Catheter tubing had fully-conductive opaque connectors which were made independently and attached to the tubing during manufacture (I J.A., 153). By contrast, the Sherwood connectors were conductive only in the "line" portion, were predominately clear rather than opaque, and were manufactured as an integral portion of the tubing itself (I J.A., 87-89).

The latter differences were particularly important, as the evidence showed, for two reasons. First, where two pieces of the Sherwood tubing were joined, a conductive connection was formed only if the "line" portions of the two pieces of tubing touched one another (unless there happened to be moisture in the tubing) (I J.A., 99; 168-169). Secondly, the line portions of the tubing bulged slightly which caused the danger of leakage when the tubing was connected (I J.A., 141-142; 166-167). Both problems were illustrated graphically by courtroom demonstrations during the trial (I J.A., 166-187) and were admitted by Sherwood in a patent application which it filed in

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[5] *See* note 7 on p. 8 *infra*.

1975.[6] In both respects, as the evidence showed, the National Catheter product differed from and was superior to the Sherwood product (I J.A., 166-187).

**Appellees' Construction of the 1971 Agreement**

Notwithstanding the numerous differences between the National Catheter conductive line tubing and the Sherwood tubing,[7] the appellees have asserted that the National Catheter tubing violates the provision of the settlement agreement relating to tubing incorporating the "features or configuration of an x-ray or *conductive line similar to the products manufactured by Sherwood as of February 1969*" (II J.A., 389, ¶ 5 (emphasis added); I J.A., 2-3, ¶¶ 10-12; II J.A., 27-30; 81). As the excerpt shows, the provision does *not* state that the appellants are precluded from manufacturing *all* conductive line tubing—it states only that the appellants are precluded from making conductive line tubing products *similar* to Sherwood's *products*. Nonetheless,

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[6] In referring to the "undesirable features" associated with the Sherwood-type tubing, the patent application specifically mentioned that the "bulging stripes [lines] . . . tended to result in fluid leakage" and that "misalignment of the stripes . . . presented the danger of not obtaining electrical interconnection between the conductive stripes of the tubes." (II J.A., 576; I J.A., 192-198.)

[7] It is undisputed, for example, that the National Catheter conductive line tubing product and the Sherwood product differ in the following respects, among others:

1. The Sherwood tubing is conductive along both its inner and outer surfaces whereas the National Catheter tubing is conductive only along its outer surface.
2. The Sherwood conductive line is molded into the wall of the tubing and extends from the outer surface to the inner surface whereas the National Catheter conductive line is welded only to the outer surface of the tubing.
3. The Sherwood tubing has a round cross-sectional configuration whereas the National Catheter tubing has a "piggyback" configuration.
4. The Sherwood tubing has predominantly clear connectors which are manufactured as an integral part of the tubing whereas the National Catheter tubing has opaque connectors which are made independently and attached to the tubing after manufacture.
5. The Sherwood connectors, except for the line portions, are nonconductive whereas the National Catheter connectors are conductive throughout. (I J.A., 87-89; 144-157; 159-169).

Sherwood's ex-president testified that this provision was intended to prevent National Catheter from making *any* type of conductive line tubing[8] (I J.A., 71).

The evidence also showed that all varieties of conductive line tubing share certain common characteristics, such as a tubular member which is predominately transparent or "clear" and a conductive line which is opaque (II J.A., 371; 392; 572; 573). Considered in light of numerous differences between the products (I J.A., 144-157), that evidence showed that except for those characteristics common to all conductive line tubing products the National Catheter product was about as *dissimilar* to the Sherwood product as any two conductive line tubing products could be[9] (I J.A., 154-157).

**The Lower Court Litigation and Appellees' Efforts To Bar National Catheter From The Market**

In April 1972, the Sherwood learned that one of the largest hospital supply dealers in the nation, American Hospital Supply Corporation ("AHSC"), was planning to purchase conductive line tubing from National Catheter (I J.A., 60). Thereafter, Sherwood's president, through a series of calls and letters to various officers and directors of AHSC, sought to prevent AHSC from purchasing National Catheter tubing by threatening, in effect, to embroil AHSC in litigation if it went ahead with its plans to purchase the tubing (I J.A., 71-74). These tactics were successful, at least in part, in that AHSC, as a result of the threats, delayed its plans to purchase the tubing which caused

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[8] That interpretation, of course, would be impossible unless the phrase immediately following "conductive line," which reads "similar to the products manufactured by Sherwood," was simply ignored.

[9] In addition, of course, the evidence showed that National Catheter tubing and the Sherwood tubing were manufactured under entirely separate product patents. On this point, appellees have conceded that the National Catheter conductive line tubing does not infringe any patents held by or licensed to the plaintiffs. (I J.A., 281, 282 [by Sheridan's attorney—objection by Brunswick's attorney sustained by the court proffer].)

National Catheter to lose over $750,000 in potential sales (I J.A., 219; 219-220; II J.A., 589).

In a further attempt to prevent National Catheter from manufacturing conductive line tubing, the appellees also filed suit against the appellants, in July 1972, in the Northern District of Illinois. The appellants moved to dismiss the suit for lack of jurisdiction, and the appellees eventually agreed to have the suit transferred to the United States District Court for the Northern District of New York.

In addition to the conductive line tubing claim, Brunswick and Sherwood asserted a claim that the process used by National Catheter to manufacture "funnel" ends for tubing violated the 1971 agreement (I J.A., 4, 5, ¶¶ 10-13). After deposing several of National Catheter's customers on this issue, and after seeking to subpoena the customers' confidential financial records, Brunswick and Sherwood eventually withdrew the claim shortly before trial (I J.A., 124).

After nearly four years of pretrial discovery, a twelve-day trial was held in April 1976. That trial culminated in the mistrial mentioned above and in the directed verdict on the antitrust count of appellants' counterclaim which is the subject of this appeal.

## ARGUMENT

### Summary of Argument

The appellees have ignored the careful description contained in paragraph 5(b) of the 1971 agreement and have sought to construe and apply the provision so broadly that appellants would be precluded from making any type of conductive line tubing whether similar in features and configuration to the appellees' product or not. The purpose of this expansive interpretation of the agreement was to attempt to extend the appellees patent monopoly in violation of section 1 of the Sherman Act.

The "ancillary restraints" doctrine would not validate the otherwise illegal competitive restraint imposed by the 1971 agreement (under appellees' interpretation) because the appellees' dominant purpose in the agreement was anti-competitive. In addition, the doctrine would not legitimatize this agreement because the appellees had monopoly power as to conductive line tubing when the restraint was imposed and because the restraint would inflict unreasonable harm on the public. The competitive restraint, therefore, was a naked restraint in violation of section 1.

Even if the ancillary restraints doctrine would otherwise apply, the restraint here would still violate section 1 because the restraint was not reasonably ancillary to any legitimate transaction. Specifically, the restraint was not reasonably necessary to protect any legitimate interest arising from the sale of Sheridan's business in 1960 or from Sheridan's prior employment relationship which terminated more than three and one-half years before the restraint at issue was imposed. Nor could the settlement of a suit support the imposition of an anticompetitive restraint.

Finally, the evidence of appellees' market dominance and of their intentional exclusionary and anticompetitive practices demonstrated unlawful monopolization, or at least an attempt or a conspiracy to monopolize, in violation of section 2.

Thus, in light of the evidence presented, the court below erred in directing a verdict because there was sufficient evidence on appellants' antitrust claim to support a jury finding that the appellees had violated both section 1 and section 2 of the Sherman Act.

## I. APPELLEES' EXPANSIVE INTERPRETATION OF THE NON-COMPETE PROVISION IN THE 1971 AGREEMENT REPRESENTED AN UNLAWFUL ATTEMPT TO EXTEND A PATENT MONOPOLY AND VIOLATED SECTION 1 OF THE SHERMAN ACT

Appellees' attempt to construe paragraph 5(b) so as to preclude National Catheter and Sheridan from manufacturing any type of conductive line tubing constitutes an effort to expand the appellees' patent rights, and this, in the context of appellees' other conduct, would plainly violate section 1 of the Sherman Act. Appellees have conceded that the tubing manufactured by the defendants does not infringe any patents held by or licensed to them,[10] and it is undisputed that National Catheter's tubing is manufactured under a separate patent issued to Isaac Jackson, a National Catheter employee, in 1972.

The law is clear that one may not extend the monopoly granted by patent beyond the exclusive right to make, use and sell the device described in the patent for the time of the patent. *Compton* v. *Metal Products, Inc.*, 453 F.2d 38, 44-45 (4th Cir. 1971), *cert. denied*, 406 U.S. 968 (1972); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942); *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436 (1940). Any agreement to extend the breadth and length of a patent (when that agreement restrains trade) would be void and unenforceable as constituting a violation of the antitrust laws. *Compton* v. *Metal Products, Inc., supra; Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973). Disputes concerning agreements of this type most frequently arise in connection with "patent misuse" claims concerning assignments of patents or patent licensing agreements; and an analysis of those cases demonstrates that paragraph 5, as construed by appellees, would constitute an unenforceable agreement

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[10] *See* I J.A., 281, 282 (proffer).

in restraint of trade in violation of section 1 of the Sherman Act.[11]

In *Compton* v. *Metal Products, Inc., supra,* for example, the court stated the following in considering an agreement closely analogous to the appellees' construction of the agreement here:

> No citation is necessary for the proposition that such an agreement, standing alone, would violate the common law prohibition against agreements in restraint of trade as well as Section 1 of the Sherman Act, 15 U.S.C. § 1, were it not for the limited exception carved out by the patent laws. However, a patentee [or one controlling the patent] is not allowed to extend the monopoly granted him beyond the exclusive right to make, use, and vend the device described in the patent for the term of the patent. [453 F.2d at 44; citations omitted.]

That appellees' interpretation of paragraph five is an attempt to expand the protection afforded by Brunswick's license cannot seriously be disputed.

The improper scope of the appellees' construction of the settlement agreement was well illustrated by the testimony of two Sherwood executives. John Willman, the former president of Sherwood, testified that it was appellees' intent throughout the settlement negotiations to prevent Sheridan from making conductive line or x-ray tubing of *any* type. Thus Mr. Willman, former president of Sherwood, testified at trial:

> Q. Right. Mr. Willman, on the day that you called Mr. Schmit of American Hospital Supply, was it your position that Mr. Sheridan was precluded by the

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[11] It should be noted that the 1971 agreement is susceptible of a more reasonable interpretation which would protect Brunswick in the proper use of the patent which was licensed to Brunswick by Sheridan and would be limited to the product depicted in its February 1969 catalog (*see* II J.A., 387-391) (this was the reason the February 1969 date was included in the agreement). Properly construed, the agreement would not prevent National Catheter from marketing its superior product.

agreement of May 28, 1971 from making any conductive line tubing?

A. Yes, sir. . . . (I J.A., 71.)

* * * *

Q. Fine, all right. Now, Mr. Willman, so that that is not hanging in the air, you have already told us you intended that to mean that Mr. Sheridan couldn't make any conductive line tubing, didn't you?

A. Yes. . . . (I J.A., 71.)

The deposition of Mr. Stanley Garber, Sherwood's patent counsel, is also revealing in that Mr. Garber expressly conceded that Sherwood was seeking to expand the protection afforded by the conductive line tubing patent licensed to Brunswick. Mr. Garber's testimony was as follows:

Q. Is it fair to say that in Paragraph five (b) . . . Sherwood, was seeking to achieve protection with respect to x-ray tubing and conductive line tubing which was broader than that afforded by the x-ray and clear conductive patents which had been licensed to Brunswick?

A. Yes, if not there would be no need to include this paragraph. [Garber Dep. 27-28 (I J.A., 198-199) ("x-ray" was transcribed in the trial transcript as "extra").]

Appellees' improperly broad interpretation of the settlement agreement is further indicated by their earlier attempt to establish that defendants breached that part of the 1971 settlement agreement dealing with "integral bubble or funnel tubing" when defendants supplied certain vena cava cannula to North American Instrument Corporation. In this regard, appellees amended their original complaint to include a count alleging that National Catheter violated the settlement agreement by dealing in flexible tubing "in which the inner and/or outer diameters of the tubing are controlled so as to incorporate the configuration of a funnel similar to those manufactured by Sherwood as of February 1969." [12]

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[12] I J.A., 4, ¶¶ 10-13.

Even a cursory reading of the settlement agreement shows that National Catheter's manufacture and sale of vena cava cannula could not conceivably violate that agreement. The agreement prohibits the manufacture only of "tubing made" by a

> process in which the wall thickness of the tubing or inner *and/or outer diameters of the tubing is/are controlled* so as to *incorporate* the features or configurations of *integral* bubble or funnel similar to those manufactured by Sherwood. (II J.A., 389, ¶ 5(b) [emphasis added].)

The purpose of this provision was to prevent National Catheter from incorporating a funnel in its tubing during the extrusion process in the manner patented by Mr. Sheridan and licensed to Brunswick. National Catheter's "flared end" is not made by this process and, in particular, it is not made by controlling the "inner and/or outer diameters of the tubing," nor is it "integrated" or "incorporated" in the tubing while the tubing is being made. Instead, the flare is made by placing an ordinary plastic catheter over a heated, cone-shaped metal form to widen and taper the end. Although this is a standard process used—in the words of Sherwood's former president—by "a jillion other people" (I J.A., 70), the appellees nonetheless sought to interpret paragraph 5 in such a way as to prevent defendants from using the process.[13]

The illegality of the appellees' overly-expansive interpretation of paragraph 5 and particularly of "similar" is indicated not only by *Compton* v. *Metal Products, Inc.*, which has previously been cited, but also by several other closely-analogous decisions. For example, in *Krampe* v.

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[13] Appellees' attempt in paragraph 5 to extend the term of the x-ray patent would also violate section 1 of the Sherman Act. *See Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269, 279-80 (8th Cir.), *cert. denied*, 414 U.S. 1022 (1973); *Compton* v. *Metal Products, Inc., supra.* The x-ray patent expired on October 28, 1975 (II J.A., 367-370); paragraph 5, in effect, would extend the effect of the patent an additional eight months, to May 28, 1976 (II J.A., 389, ¶ 5.)

*Ideal Industries, Inc.* 347 F. Supp. 1384 (N.D. Ill. 1972), the court was faced with a non-compete agreement comparable to that found in paragraph five. There a defendant was sued for patent infringement. Defendant moved for summary judgment against plaintiff on the basis of patent misuse stemming from the terms of plaintiff-patentee's contract with his licensee. That agreement provided that:

> The licensed vendor undertakes to sell no products of other manufacture [sic] *which are identical with or similar to [the patented device]*. He will also avoid any direct or indirect competition relative to the manufacturer. In particular, he may not act for a third party which makes or sells identical or similar products, either directly or indirectly, within or without the (licensed) territories, be it as a licensed vendor, commission vendor or representative. This also applies to the sale of used products. Exceptions require the written agreement of the manufacturer. [*Id.* at 1385-86. (Emphasis added).]

The court agreed with defendant's contention that the "contractual preclusion of [the licensee] to deal in competitive goods constitute[d] an enlargement of plaintiff's monopoly beyond the limitation inherent in the patent grant." *Id.* at 689. The court found this agreement to be a patent misuse and granted defendant's summary judgment motion to dismiss plaintiff's infringement action.

The rationale given by the court in *McCullough* v. *Kammerer Corp.*, 166 F.2d 759 (9th Cir. 1948), *cert. denied*, 335 U.S. 815 (1948) is also directly applicable to the instant case. McCullough dealt with an action by Kammerer Corporation and another against Ira J. McCullough for patent infringement of a certain pipe cutting device. There the court found an agreement similar to the Brunswick-Sheridan agreement to be against the public interest in that it "stifled new competitive invention and suppressed competitive forces which stimulate newer and better products. . . ." 166 F.2d at 764. The challenged provisions of the contract contained in a license agreement read as follows:

The Licensee covenants and agrees during the term of this license agreement not to manufacture or use or rent any device which will be in competition with the device or devices covered by this license agreement.

The Licensor covenants and agrees during the term of this agreement not to manufacture, sell, rent, license, use, or in any way do business with the device or devices covered by this agreement or with devices which will come or be in competition with the device or devices covered by this agreement. [*Id.* at 760.]

The court determined that this agreement extended the monopoly of the patent by preventing competition with the patent "of any other pipe cutter, patented or unpatented, manufactured, used or sold by the licensee. . . ." *Id.* Thus, neither the licensee nor the licensor would be permitted to introduce such competitive products. The court determined such an agreement to be against public policy.[14]

Moreover, the *McCullough* court was particularly concerned with this type of restrictive agreement since it would have the effect of stifling "inventive genius." As the Court stated:

With regard to the agreement's compulsion on the patentee not to exercise the inventive power of its

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[14] Two recurring reasons are found in these cases demonstrating why a court will not enforce such an agreement which attempts to extend the breadth or length of a patent. First, to allow one to benefit through such an improper use of a patent would be to extend the arm of a court of equity in expanding a patent beyond its legitimate scope (which is to legitimize that which otherwise would be a clear violation of the antitrust laws). Any step beyond the patent transcends the immunity which the patent protection affords and will not be sanctioned. *Hensley Equipment Co., Inc.* v. *Esco Corp.*, 383 F.2d 252 (5th Cir. 1967), *modified* 386 F.2d 442 (5th Cir. 1967). Appellees seek the aid of this Court in enforcing an agreement which, by appellees' interpretation, would be a clear contract in restraint of trade. Courts do not enforce such illegal contracts. Second, courts will not enforce agreements which are contrary to the public interest by reason of their unlawful tendency to suppress competition. *Valmont Industries, Inc.* v. *Yuma Mfg. Co., Inc.*, 296 F.Supp. 1291 (D. Colo. 1969). To interpret paragraph 5 as restraining Sheridan from dealing in medical flexible tubing other than that stated in the patent grants now controlled by Brunswick clearly would be contrary to the public policy. To so read this agreement would be to allow Brunswick effectively to bar Sheridan from the field of medical flexible tubing.

> general manager and other employees in privity with it, in creating carpeting devices, the purpose of the patent law is to encourage, not to hamper, invention." [166 F.2d at 762.]

The appellees' objective in this action is precisely the same. Indeed, the appellees have sought to use paragraph 5 as a means of foreclosing competition not only by Sheridan, an admitted genius in the field of medico-surgical tubing (*see, e.g.*, I J.A., 26, 68), but also by anyone associated with Sheridan in any business capacity whatever. In fact, in this action, the injunction, declaratory relief and damages sought relate to a product invented by Isaac Jackson, National Catheter's Director of Product Development, rather than Sheridan.

## II. THE "ANCILLARY RESTRAINTS" DOCTRINE WOULD NOT APPLY BECAUSE APPELLEES' DOMINANT PURPOSE WAS ANTICOMPETITIVE, BECAUSE APPELLEES HAD MONOPOLY POWER AND BECAUSE THE NON-COMPETE AGREEMENT INFLICTED UNREASONABLE HARM ON THE PUBLIC.

Normally an agreement among competitors not to compete is *per se* unlawful under Section 1 of the Sherman Act. *E.g., Timken Roller Bearing Co.* v. *United States,* 391 U.S. 593 (1951). The 1971 agreement, as appellees have sought to construe it, was precisely such an agreement. Appellees have sought to defend the restraint by invoking the doctrine of "ancillary restraints." In this case, however, the doctrine would not apply (a) because appellees' dominant purpose in obtaining the agreement was anticompetitive, (b) because the appellees possessed monopoly power with respect to the product involved when the restraint was imposed and (c) because the restraint would have inflicted unreasonable harm on the public,

### A. The "Ancillary Restraints" Doctrine Would Not Apply Where the Dominant Purpose Was To Eliminate Competition

The controlling principle was well stated in *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110 (1948). In

*Schine,* the Court rejected the defendant theater chain's assertion that its noncompetition covenants were reasonable incidents to contracts for the purchase of theater properties. The Court affirmed the district court's findings of violations of section 1 and 2 of the Sherman Act, holding:

> Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for that unlawful purpose. If we had here only agreements not to compete, the inferences drawn by the District Court might not be warranted. But in the setting of this record, and against the background of Schine's other monopolistic practices, it seems to us that the District Court might infer that the requisite purpose was present and that these agreements were additional weapons in Schine's arsenal of power through the use of which its monopoly was sought to be extended. [334 U.S. at 119 (citations omitted).]

The principle applied by the Court in the *Schine* case has been long established. For example, in the landmark case of *United States* v. *American Tobacco Co.,* 221 U.S. 106 (1911), the Court found noncompetition covenants to be properly condemned under the Act as part of an unlawful scheme, whatever might be their legality if "isolatedly viewed." 221 U.S. at 183. The courts have continued to recognize and apply the same principle in a variety of antitrust contexts.[15]

A recent case applying the rule in a factual situation strikingly similar to the instant case is *Lektro-Vend Corp.* v. *Vendo Co.,* 403 F. Supp. 527 (N.D. Ill. 1975), *aff'd,* 545 F.2d 1050 (6th Cir. 1976), *rev'd on other grounds,* 97 S.Ct.

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[15] *E.g., Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 377 (1972); *A. E. Plastik Pak Co.* v. *Monsanto Co.,* 396 F.2d 710, 715 (9th Cir. 1968); *Denison Mattress Factory* v. *Spring-Air Co.,* 308 F.2d 403, 408 (5th Cir. 1962); *Bowl America, Inc.* v. *Fair Lanes, Inc.,* 299 F.Supp. 1080, 1091 (D. Md. 1969); *Sar Industries, Inc.* v. *Monogram Industries, Inc.,* 1976-1 CCH Trade Cases ¶ 60,816 (C.D. Calif. 1976).

2881 (1977). In that case, the court succinctly stated the rule:

> A covenant not to compete examined in light of other monopolistic practices can be declared illegal even if otherwise lawful *if it can be shown that the object and the effect of the agreement was primarily directed at the elimination of competition.* [403 F. Supp. at 535; emphasis added.]

In the present case, the evidence amply supports the conclusion that Brunswick's dominant purpose in obtaining the 1971 agreement was anticompetitive. The agreement ostensibly was a "settlement" of the lawsuit Brunswick brought against Sheridan and National Catheter in 1968, but the lawsuit itself represented an effort by Brunswick to bar Sheridan from competing and to destroy National Catheter before it could even get started. Brunswick and Sherwood were seeking to enforce in that suit the sweeping 19-year noncompetition covenant obtained by Brunswick in 1960 to prevent Sheridan's competition with respect to any of Brunswick's products anywhere in the world. They took their action even though the covenant was of doubtful enforceability and Brunswick's removal of Sheridan from his position as head of the tubing division constituted a breach rendering the covenant inapplicable.

In the "settlement" of its claims against Sheridan, the primary consideration flowing to Brunswick under the agreement was the noncompetition covenant itself. Although the agreement purported to settle Brunswick's claims against Sheridan for a list of alleged wrongs, the essence of the "settlement" of those claims was the payment of a substantial sum of cash *by* Brunswick *to* Sheridan in return for the noncompetition covenant. By the combined force of a monetary inducement (the cash payment to Sheridan) and coercion (Brunswick's threat of continued use of its superior resources to continue the overwhelming burdens of litigation indefinitely), Brunswick obtained its noncompetition guarantee.

In addition, as discussed above in Part I of the Argument, Brunswick's principal purpose in obtaining the 1971 agreement was to attempt to extend its patent monopoly. Brunswick's own documents leave little doubt as to its purpose in obtaining the agreement. One internal memorandum not communicated to Sheridan during the negotiations states it baldly:

> [O]ur desire is to preclude Dave's ingenuity and imagination from figuring out ways to do what we are able to do with the use of his patents. Therefore, we would not be interested in giving him the right to do what anyone else can do. He has proven to be more imaginative in these areas. (I J.A., 579-580.) [16]

Thus, the target of the covenant was Sheridan's acknowledged creativity and innovation, which Brunswick had every reason to want excluded from the competitive arena. No mention was made of any arguably legitimate motives such as protection of any *Brunswick* confidential trade secrets or technical know-how, for the simple reason that there were none to protect. The key to success in the production of a competitive conductive line tubing was the creative idea, and it was universally acknowledged that Sheridan was the most creative inventor in the field. The evidence at trial also showed that once the idea was developed, actual manufacture of the tubing was a relatively simple process that could be accomplished by qualified technicians with ease in 15 minutes (I J.A., 120-122). It was the threat of the creative idea—an idea that could lead to an equally attractive or even a better product than the one Brunswick produced under its patent license—that Brunswick sought to bar.

The overall pattern of Brunswick's conduct and practices, in addition to the 1971 agreement itself, further leads inescapably to the inference of Brunswick's dominant anti-

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[16] Defendants' Exhibit BT, from which this language is taken, was marked for identification and offered into evidence by Counterclaimants, but excluded by the trial judge. (Tr. 1198; I J.A., 279-281; 282-284.)

competitive purpose. From the very beginning Brunswick had chosen to build its medical supply division by acquisitions rather than by internal growth. In obtaining rights to use Sheridan's conductive line tubing, Brunswick was not satisfied merely to obtain the use of the patents for itself; it insisted that its rights be to the total exclusion of Sheridan and every other competitor or potential competitor. Brunswick also had insisted on a sweeping 19-year noncompetition clause in Sheridan's employment contract. Later, when Brunswick no longer wanted Sheridan to run its medical tubing division, it proceeded to disregard its explicit contractual obligation that he was to be "head" of the division, knowing full well that if it openly terminated his employment, he would be free to compete. Brunswick's attempt to use the 1971 agreement to dissuade National's prime customer from performing on its purchase contract further reveals Brunswick's motivations. And, finally, Brunswick used its successive lawsuits not only to discourage customers from purchasing from National, but also to attempt to exhaust Sheridan's and National's resources and to prevent them from entering the market for conductive line tubing that had been Brunswick's exclusive domain since 1962.

Viewing the noncompetition agreement in the light of these practices, the agreement was unlawful under Section 1 of the Sherman Act because, as the court found with respect to the covenants in *Lektro-Vend, supra,* their "object (and effect) were primarily directed at the elimination of competition rather than the protection of good will." [403 F. Supp. at 533].[17]

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[17] The Court of Appeals unanimously affirmed the district court's decision in *Lektro-Vend* and specifically rejected Vendo's claim that the facts failed to support the district court's views on the merits [548 F.2d at 1059]. The Supreme Court reversed on a procedural ground, but in so doing assumed the validity of the underlying antitrust decision. The plurality opinion in the Supreme Court concluded that the federal court was barred by the federal Anti Injunction Act, 28 U.S.C. § 2283, from enjoining the state court proceedings. The presence of all

The decision in *Vancouver Malt & Saki Brewing Co. Ltd.* v. *Vancouver Breweries, Ltd.* (1934) A.C. 181, 188-89 (P.C.) (B.C.) is apposite. Lord MacMillan, speaking for the Privy Counsel, observed that this was a case

> . . . not of restrictive covenants in aid of a sale, but of a sale in aid of restrictive covenants. It may be shrewdly suspected that the draftsmen . . . invented the imposing facade of a sale to conceal the nakedness of the restrictive covenants which were the real object of the transaction. Stripped of its adventitious trappings, the agreement is nothing more or less than a contract whereby in consideration for a sum of money the appellants undertake for a period of fifteen years not to engage in the business of brewing beer.

So it is with the settlement agreement in the instant case. The transaction, particularly with the expansive interpretation given its terms by Brunswick, is nothing more or less than a contract for a consideration not to compete in the business of conductive line tubing for a specified period. Its dominant purpose and effect, indeed its only real purpose and effect, is the elimination of competition.

### B. "Ancillary Restraints" Doctrine Also Would Not Apply Because Appellees Possessed Monopoly Power Regarding Conductive Line Tubing

Application of the ancillary restraints doctrine would be barred not only where the dominant purpose was anticompetitive but also where the restraint was imposed by a party holding monopoly power. This limitation on the application of the doctrine has been recognized ever since the classic explication of the doctrine by Judge Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). Thus, for example, this Court ruled in *Bascom Launder Corp.* v. *Telecoin Corp.*,

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issues, both state and federal, in a single federal court proceeding in the instant case avoids the problem of application of the Anti Injunction Act.

204 F.2d 331 (2d Cir.), *cert. denied,* 345 U.S. 994 (1953), that despite the defendant's attempt to defend a restrictive agreement on the basis of ancillary restraints, the plaintiff could prevail on its Section 1 claim if it could show that the defendant "had a monopoly in fact of the product it sold." 204 F.2d at 335. The lower court therefore erred in taking the issue from the jury since the evidence was in dispute as to the defendant's monopoly power. *Id. Accord, United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153, 178 (S.D.N.Y. 1960) (ancillary restraints doctrine permits a restraint which, *inter alia,* "is not imposed by a party or parties with monopoly power").

In the instant case, the evidence at trial showed that in 1971 when Sherwood obtained the noncompetition agreement from Sheridan and National Catheter, Sherwood was the sole manufacturer and seller of conductive line tubing in the country (I J.A., 75, 136, 137). It had held its exclusive position since the introduction of the tubing in 1962. (*Id.*)

Moreover, the fact that Sherwood's monopoly was derived from a patent provides it with no legitimate basis for seeking to extend its monopoly. To the contrary, as pointed out above in Part I of the Argument, a party's effort to expand its patent protection represents a classic misuse of the patent and, where a restraint of trade is involved, a violation of the antitrust laws. *See, e.g., Compton* v. *Metal Producers, Inc.,* 453 F.2d 38 (4th Cir. 1971), *cert. denied,* 406 U.S. 968 (1972).

In short, even where it might otherwise be available, the ancillary restraints doctrine is inapplicable when the party seeking to invoke the doctrine possessed monopoly power—as Brunswick and Sherwood did here as to conductive line tubing.

### C. "Ancillary Restraints" Doctrine Would Not Apply In Any Event Because Unreasonable Harm Would Have Been Inflicted On The Public.

The evidence in the record in this case is uncontrovertible on the unreasonable harm which the public would have suffered if Brunswick and Sherwood had succeeded in preventing National Catheter from bringing its conductive line tubing to the market. The evidence—including statements contained in Sherwood's own patent application (II J.A., 576) and the testimony of its own expert (I J.A., 99)—showed that the Sherwood tubing presented a serious danger of a nonconductive conjunction, at least when dry. Hence, the tubing permitted the accumulation of static electricity and presented the hazard of a spark (or a microshock and cardiac arrest) which is exactly the hazard which the tubing was intended to obviate (I J.A., 99).

In addition, and again on the basis of Sherwood's own statements, the Sherwood tubing has a tendency to leak (II J.A., 576). Nonetheless, even after it was aware of the serious deficiency, Sherwood persisted in its effort, through an attempt to enforce its misconstruction of the non-compete provision, to keep from the public a demonstrably superior tubing (I J.A., 201).

Sherwood and Brunswick also made every effort to prevent the public from enjoying the benefits of Sheridan's remarkable inventive prowess. For more than two decades, Sheridan has devoted his efforts largely to the development of medicosurgical tubing—and his skill [18] and the results have been amazing. And Sheridan's inventive ability, since it relates to health, is in an area where an inventor's skill can be of great benefit to the public—and where harm to the

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[18] Sheridan's inventive ability has been readily acknowledged by the appellees. For example, Howard Baer, the former president of a Brunswick subsidiary, characterized Sheridan as the "best scientific brain in the entire surgical plastic field" and as a "genius" in that field. (I J.A., 68.)

public can be equally great if the inventor is precluded from using his skill.

In this case, Brunswick not only sought to prevent Sheridan from exercising his skill but, through Sheridan, also sought to prevent Isaac Jackson, the inventor of National Catheter's conductive tubing, from exercising his inventive ability in developing new medical devices. In summary, appellees' conduct demonstrates their disregard of the public good—and because of the harm which would flow from their actions, and their anticompetitive purpose, and their monopoly over the product involved, they are precluded from relying on the doctrine of "ancillary restraints."

## III. EVEN IF THE "ANCILLARY RESTRAINTS" DOCTRINE APPLIED, THE RESTRAINT WHICH APPELLEES SOUGHT TO IMPOSE WAS NOT REASONABLY ANCILLARY TO ANY LEGITIMATE TRANSACTION.

Even assuming, *arguendo*, that the "ancillary restraints" doctrine could be applied here, it would not support the restraint which the appellees sought to impose because the restraint was not reasonably ancillary to the 1960 acquisition, or to Sheridan's prior employment, or to any interest related to the 1971 settlement.

### A. The 1960 Acquisition Would Not Support The Restraint

Brunswick and Sherwood initially sought to assert at trial that the restraint in the 1971 agreement was necessary in connection with the acquisition of Sheridan's business more than a decade earlier. In addition to ignoring the time span involved, this purported justification also fails to account for half of the parties involved in this litigation.

The simple fact is that neither Sherwood Medical Industries nor National Catheter Corporation—both of whom were parties to the 1971 agreement—had anything to do with the 1960 transactions. National Catheter never was

employed by, never sold any business to, never licensed anything to, nor ever had any other contractual relationship with either Brunswick or Sherwood. The 1971 noncompetition agreement was its first and only transaction with either Brunswick or Sherwood. This gap is particularly significant in light of the fact that the primary inventor and developer of the new tubing that Brunswick sought to block National Catheter from marketing under the noncompetition agreement was not Sheridan, but Isaac Jackson, a National Catheter employee.

Moreover, even with respect to Sheridan, it is clear that a non-compete agreement in 1971 was not a reasonably necessary provision to effectuate the legitimate purposes of the 1960 transactions. With respect to the purchase of Sheridan's company in 1960, Brunswick at trial characterized the business it purchased as "inconsequential" (I J.A., 49) and never even attempted to show that any purchase of goodwill was involved. Thus, based on Brunswick's own admission, it is doubtful that a noncompetition clause would have been sustained if it had been imposed in connection with the acquisition in February 1960—and it is certain that the acquisition will not support a restraint imposed eleven years later and purporting to remain in effect until May 1976.

**B. Sheridan's Prior Employment Which Terminated More Than Three and One-Half Years Before The 1971 Agreement Could Not Support The Restraint.**

Nor can the 1971 agreement be defended as reasonably necessary to Brunswick's employment of Sheridan in 1960. The normal justification for noncompetition clauses in employment contracts is to protect the employer's trade secrets, know-how, and confidential customer lists. Here, however, it was Sheridan—not Brunswick—who possessed the valuable know-how in the production of medical tubing. The flow of information was from Sheridan to Brunswick, not the reverse. Indeed, Brunswi[illegible]n documents at the

time of the 1960 transaction make clear that its concern was not with protecting *its* know-how, but with blocking *Sheridan's* know-how from ever being a competitive threat after his employment ceased (II J.A., 385). Brunswick at trial candidly reaffirmed that this was indeed its purpose (I J.A., 46-49). Thus, the 1960 employment agreement does not justify a noncompetition agreement 11 years later; if anything, it only further demonstrates the illegitimacy of Brunswick's efforts to insulate itself from competition.

During the trial, Brunswick relied heavily on *Bradford* v. *New York Times Co.*, 501 F.2d 51 (2d Cir. 1974). That reliance, however, is misplaced. *Bradford* involved an employee incentive pension plan under which a retired employee received annual payments in the form of New York Times stock. The payments could be terminated, however, if while receiving the benefits the employee accepted employment that involved competition detrimental to the Times. 501 F.2d at 54. In upholding the Times' decision to terminate the benefits of plaintiff Bradford, this Court emphasized that the Times' plan involved a "continuing consideration" paid by the Times for the employee's loyalty. The plan, therefore, did not raise the "elements of unfairness" of other common law cases where the employee's opportunity to make a living was curtailed. *Id.* at 58. The Court thus emphasized that the Times sought neither injunctive relief to halt Bradford's competition nor the payment of damages. *Id.*

The very elements the Court found absent in *Bradford* are present here. Brunswick was not seeking to terminate payment of retirement benefits, for no such benefits are at issue. Instead, Brunswick was seeking to do precisely what the Court emphasized the Times was not: it sought a court injunction against Sheridan and National's competition and it sought the award of millions of dollars in damages.

Moreover, *Bradford* makes clear that the primary issue raised and resolved was the reasonableness of the agree-

ment under traditional state common law standards *Id.* at 55. No allegations were made and no evidence presented to even suggest that the Times had monopoly power in the newspaper business, that the dominant purpose of the pension plan was anticompetitive, or that the pension plan was part of an ongoing pattern of anticompetitive conduct and practices. Indeed, the Court found that the agreement had at most "de minimus effect, if any, upon interstate commerce." *Id.* at 59, n.5.

Thus, the Court in *Bradford* recognized, quite properly, that under the circumstances presented in that case, the federal antitrust laws added little to the state common law analysis. The present case, in stark contrast, presents a panoply of antitrust issues arising out of the market dominance of the party obtaining the covenant, the improper expansion of patent rights to bar competition in unpatented products, and the surrounding circumstances of a continuing pattern of anticompetitive practice. As is discussed in the preceding sections of this brief, antitrust courts have consistently recognized that, whatever the validity of a covenant viewed in isolation, it may violate the Sherman Act when examined in the context of its anticompetitive purpose and effect. *See Schine Theatre Chain, supra* at 18, and the discussion *supra* at 18-23. The *Bradford* case involved no such anticompetitive circumstances, and the decision therefore casts no light on the very different issues presented in the instant case.

### C. Finally, A "Settlement Agreement" Among Competitors Will Not Support A Competitive Restraint.

Brunswick also has asserted that the settlement of litigation in 1971 would somehow support a competitive restraint. The relevant cases demonstrate, however, that a settlement agreement among competitors is not the kind of primary transaction which would support a restraint upon competition even if the "ancillary restraints" doctrine would otherwise apply.

Judge Taft's decision in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), contains an extensive analysis of the ancillary restraints doctrine and reviews the five types of commercial transactions to which the doctrine has been applied. 85 F. at 281. Settlement of private litigation is not mentioned, nor is anything even resembling such transactions included.

Judge Taft's list is not necessarily meant to be exhaustive of all possibilities, but his analysis of their common element makes clear why settlement agreements such as in the instant case are of a different character. He thus explains with respect to the types of transactions he lists:

> The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. [*Id.* at 282.]

Obviously, a settlement agreement provides no such "uniform standard" for judging the degree of protection needed. Presumably, the measure of restraint "necessary" for a settlement agreement is that which the party bringing the suit is willing to take in return for the termination of the litigation. The antitrust court, attempting to determine the reasonableness of the restraint in light of the settlement transaction, thus would be hopelessly adrift without direction or standards.

It is therefore not surprising that Brunswick has not been able to cite any case in which any court has ever upheld a restrictive covenant as a reasonable ancillary restraint to a litigation settlement agreement. Far from recognizing such agreements as supporting restrictive covenants, the courts have condemned agreements ostensibly entered into to settle litigation when their effect has been anticompetitive, without an ancillary restraints analysis. *E.g., United States* v. *Singer Manufacturing Co.*, 374 U.S.

174 (1963). *United States* v. *National Lead Co.,* 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd,* 332 U.S. 319 (1947).

In *Business Forms Finishing Service, Inc.* v. *Carson,* 452 F.2d 70 (7th Cir. 1971) (Stevens, J.), the court reviewed the enforceability of a patent recognition clause that had been embodied in an agreement settling a patent infringement suit. The court found the clause to be analogous to a covenant not to compete and to raise similar public policy considerations. 452 F.2d at 73. The court went on to reject squarely the use of a settlement agreement to justify the patent recognition clause:

> As we read the recent decisions of the Supreme Court, which are strikingly unanimous in result as well as reasoning, the desirability of settling a lawsuit would not in itself establish sufficient justification for such an agreement. [*Id.* at 74.]

A similar rationale was adopted by this Court in refusing to enforce a private contractual arrangement to resolve antitrust claims by arbitration. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.,* 391 F.2d 821 (2d Cir. 1968). Emphasizing "the pervasive public interest in enforcement of the antitrust laws", 391 F.2d at 827-28, the Court expressed the impropriety of permitting purely private agreement to resolve antitrust claims:

> The claim here is that the agreement itself was an instrument of illegality; in addition, the issues in antitrust cases are prone to be complicated, and the evidence extensive and diverse, far better suited to judicial than to arbitration procedures. Moreover, it is the business community generally that is regulated by the antitrust laws. Since commercial arbitrators are frequently men drawn for their business expertise, it hardly seems proper for them to determine these issues of great public interest. [*Id.* at 827.]

This is not to say that parties can never settle antitrust claims or that the resolution of litigation is not normally

desirable. But, when a private settlement between competitors involves a patently anticompetitive agreement, that agreement can obtain no immunity from the antitrust laws simply because it is labeled as a "settlement" agreement. Neither authority nor reason support such a novel and dangerous expansion of the doctrine of ancillary restraints.

In summary, even if the "ancillary restraints" doctrine applied here—which it does not—there is no transaction which would support the restraint which Brunswick and Sherwood sought to impose.

## IV. THE COURT BELOW ERRED IN DIRECTING A VERDICT BECAUSE THERE WAS SUFFICIENT EVIDENCE TO PERMIT FINDINGS THAT APPELLEES' DOMINANT PURPOSE WAS ANTICOMPETITIVE, THAT THE HARM INFLICTED UPON THE PUBLIC BY THE ATTEMPTED RESTRAINT WOULD BE UNREASONABLE AND THAT THE ATTEMPTED RESTRAINT WAS NOT REASONABLY ANCILLARY TO ANY LEGITIMATE TRANSACTION.

As shown above, the granting of a directed verdict on appellants' section 1 claims was based on a misapprehension of the fundamental principles involved which simply would not support the restraint on competition which appellees sought to impose. Moreover, the court below erred in granting a directed verdict because there was sufficient evidence to permit a finding by the jury, for example, that the dominant purpose of the 1971 agreements was anticompetitive, which would have established a section 1 violation.

An exacting burden must be met to justify a directed vedict in an antitrust case. The Supreme Court has strongly admonished against the use of summary procedures in complex cases under the federal antitrust laws:

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of

> the alleged conspirators, and hostile witnesses thicken the plot. [*Poller* v. *CBS, Inc.*, 368 U.S. 464, 473 (1962).]

This Court has heeded the admonition and has itself cautioned against improper use of summary procedures in cases arising under the Sherman Act. *E.g., American Manufacturers Mutual Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 279-80 (2d Cir. 1967).

The reasons for this special presumption against summary procedures in antitrust cases are several. First, antitrust actions are not merely private disputes, but also "serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research Corp.*, 395 U.S. 100, 130-31 (1969). Second, the substantive standards of illegality, which often turn on judgments as to reasonableness and intent, are poorly suited to summary resolution. *Poller, supra.* And, finally, as a practical matter it is recognized that antitrust violators seldom admit wrongdoing or leave a clear trail of direct evidence, so that proof of violations must normally be based on inferences drawn by the jury from the total pattern of evidence presented. *Id.*

Although the *Poller* case itself involved a motion for summary judgment rather than a directed verdict as here, the courts have recognized that its rationale applies equally to all procedural devices, including directed verdicts, that prevent the antitrust jury from functioning as the ultimate fact finder. *E.g., Cornwell Quality Tools Co.* v. *C.T.S. Co.*, 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F.2d 1095 (6th Cir. 1971), *cert. denied,* 406 U.S. 919 (1972); *Blankenship* v. *Hearst Corp.;* 519 F.2d 418 (9th Cir. 1975). The standard test for a directed verdict requires that all evidence and all possible inferences from the evidence must be viewed in the light most favorable to the nonmoving party and that a directed verdict can be granted only if the evidence and inferences, viewed in that light, could not possibly support a verdict for the nonmoving

party. *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 646 (1962); *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970). Where the validity of antitrust claims turns on critical inferences as to intent and reasonableness, it is the jury, not the trial judge, that must weigh the evidence and draw the inferences.

In this case, the evidence to which reference is made in preceding sections demonstrates that there would have been ample support for findings that the dominant purpose of the 1971 agreement was anticompetitive, that appellees' intent in the agreement was to extend a patent monopoly and that the public harm which would have resulted from enforcement of the restraint would have been unreasonable. Indeed, we contend that the evidence on those points was so strong that *appellants* were entitled to a directed verdict.

Equally strong was the evidence that neither the 1960 acquisition, nor Sheridan's prior employment could justify the attempted restraint. Any one of those findings would have established a violation of section 1 of the Sherman Act in this case.

In summary, based on the evidence presented and the stringent standard to be applied in weighing that evidence, the trial court erred in directing a verdict on appellants' claims under section 1 of the Sherman Act.

## V. THE COURT BELOW ERRED IN DIRECTING A VERDICT BECAUSE THERE WAS ALSO SUFFICIENT EVIDENCE TO PERMIT A FINDING THAT APPELLEES' CONDUCT VIOLATED SECTION 2 OF THE SHERMAN ACT.

Count I of the counterclaim also alleged violations of the monopolization prohibitions of section 2 of the Sherman Act. The evidence of Brunswick's anticompetitive conduct in seeking to obtain and maintain its dominant position with respect to conductive line tubing fully supported those allegations and would have entitled the jury to find that

Brunswick was guilty of (1) monopolization, (2) an attempt to monopolize or (3) combining or conspiring to monopolize.[19]

The central fact in a monopolization case is the defendant's share of the relevant market. Here, that fact was not really in dispute since Brunswick's own exhibits and witnesses made clear that Brunswick was the sole manufacturer and seller of clear conductive tubing until 1972 (*i.e.*, 100 percent of the market) and that until the time of trial it remained the largest seller, with sales five times larger than its nearest competitor and two times larger than all other sellers combined (*i.e.*, more than 67 percent of the market).

The evidence also shows that conductive line tubing is a distinct and separate product market for section 2 purposes. The tubing has unique characteristics and uses, and virtually no viable substitutes exist. *Cf.*, *e.g.*, *United States* v. *E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The undisputed evidence that the sellers, including Brunswick, market the tubing on a national basis also demonstrates that the national market is the relevant one in geographical terms. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 576 (1966).

Moreover, no argument could be made that Brunswick's monopoly was "thrust upon" it, even assuming that such a defense existed in monopolization cases. *See United States* v. *Aluminum Co. of America*, *supra*, 148 F.2d at 429. The entire pattern of conduct by which Brunswick sought to create its exclusive market power and then to block all

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[19] "Attempt to monopolize" is, of course, an offense that can be committed by a single entity, while "combining or conspiring to monopolize" is essentially the same offense committed by concerted action by two or more enterprises. Thus, it is immaterial whether the conduct here is characterized as Brunswick's alone or as Brunswick in combination with Sherwood or Sheridan.

threatened encroachment by others would make any such suggestion untenable.

In addition, there was sufficient evidence to permit a finding of an attempt to monopolize, even if no actual monopolization were shown. Brunswick's conscious and willful acquisition of market power plus its deliberate attempts to exclude new entrants are the unmistakable earmarks of an unlawful scheme to attempt to monopolize. The similar pattern of conduct in the *Lektro-Vend* case, *supra* at 19-20, was found by the court to support a finding of an attempt to monopolize. 403 F.Supp. at 533-34. Similarly, in the *Sar Industries* case, *supra* at 19 n.15, evidence of conduct including the extraction of broad non-compete covenants and litigation and threats of litigation against competitors based on those covenants was found by the court to demonstrate an attempt to monopolize. 1976-1 CCH Trade Cases at 68,522. Tortious threats to potential customers of involvement in litigation if they purchase from a competitor has also been recognized as probative of monopolistic purpose. *Forgett* v. *Scharf*, 181 F.2d 754 (3d Cir.), *cert. denied*, 340 U.S. 825 (1950).

Thus, the trial court's action in directing a verdict for Brunswick on count I of the counterclaim was also in error by excluding the section 2 monopolization and attempt to monopolize claims from the jury.

## CONCLUSION

For the foregoing reasons, appellants Sheridan and National Catheter respectfully request that an order be entered reversing the directed verdict against appellants on count I of appellants' counterclaim. Appellants also request, based on the reasons set forth under headings I, II, III and V, that an order be entered directing the trial court to enter a judgment in appellants' favor on the issue of liability on count I of appellants' counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for Appellants were mailed, first class postage prepaid, this 23rd day of November 1977 to Watson B. Tucker, Esquire, Mayer, Brown & Platt, 231 South LaSalle Street, Chicago, Illinois, 60604, counsel for appellees.

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